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No. _____

IN THE

Supreme Court of the United States

October Term, 1981

JAMES E. PAULK,
Petitioner,

V.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

1. Whether there was sufficient evidence in the record which connected Paulk as a knowing participant to the alleged conspiracy, especially here, where the trial court granted defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict.

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, JAMES E. PAULK, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-4a) was unpublished.

JURISDICTION

The decision of the Court of Appeals (App. A) was entered on April 29, 1982. A petition for rehearing with a suggestion for rehearing en banc was denied on June 25, 1982. (App. B, *infra*, 1b). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Petitioner, JAMES E. PAULK, was initially indicted with four other defendants,[1] on charges of conspiracy to possess with intent to distribute methaqualone tablets, in violation of 21 U.S.C. §846.

On January 29, 1981, Tedder entered a guilty plea on the conspiracy charge.[2] An order of nolle prosequi was entered as to the separate charge against Tedder pursuant to a plea agreement.

On March 23, 1981, Paulk, along with Williams and Lippner went to trial.[3] Tedder was the key government witness.

The evidence at trial showed that in the fall of 1980, Lippner and Tedder had discussions about smuggling marijuana into the United States. Through various sources Tedder contacted Robert Johannesen, a Drug Enforcement Administration (DEA) agent posing as a potential pilot for drug smuggling operations, about being a pilot for their operation.

In November, 1980, Tedder flew to Atlanta for a meeting with Johannesen to discuss the marijuana smuggling. Johannesen told Tedder that he had a quantity of "quaaludes" (methaqualone tablets) for sale and was looking for a buyer. Subsequently, Tedder arranged for Johannesen to sell the quaaludes to customers in Savannah, Georgia.

---

[1] James Buddy Williams, Robert L. Lippner, Jr., Robert Jackson Tedder and Leonard DeWitt Mills were named as co-defendants.

[2] Tedder had also been charged with use of a communication facility in committing a felony.

[3] On March 18, 1981, Mills was severed from the other co-defendants and the charges against him were subsequently dismissed by the government.

On November 18, Tedder and Lippner flew to Miami picking up James Paulk enroute. Tedder testified he spent much of that day with Lippner and Paulk in Lippner's airplane. Although Tedder had substantial contact with Paulk on that date, Tedder testified that "quaaludes" were never discussed. During his entire testimony about the events of November 18, 1980, Tedder never once mentioned anything about a "quaalude deal". That night Lippner, Tedder and Paulk flew to Savannah and checked into rooms at the Holiday Inn previously reserved by Tedder in Lippner's name. At about 7:00 A.M. on November 19, Tedder went to Paulk's room to borrow some shaving items and met Williams and Mills. Tedder testified (although this was not substantiated by any other testimony or evidence) that Paulk informally introduced Tedder to Williams and Mills and purportedly said he or they would be "the persons that [Tedder] would be introducing to [Tedder's] people".

Subsequently, Mills drove Tedder to the Master Hosts Inn so that Tedder could arrange a meeting with Johannesen. Mills returned to the Holiday Inn. After contacting Johannesen, Tedder called Paulk at the Holiday Inn and told him to bring Williams and Mills to the Master Hosts. After Paulk, Williams and Mills arrived at the Master Hosts, Tedder introduced Williams to Johannesen while Paulk waited in the motel restaurant. Tedder and Paulk then left for the airport.

Williams and Johannesen then met DEA agent Sprague and in a tape-recorded conversation, the three men discussed the drug transaction in detail. After some discussion of price, Williams led Johnannesen to a car in the parking lot and showed him a grocery bag filled with cash. When the two men returned to the motel, the agents

arrested Williams. A search of Williams' person revealed a pair of brass knuckles, and a search of the car uncovered a loaded .38 caliber pistol.

County law enforcement personnel, meanwhile, followed Paulk and Tedder after they departed the Master Hosts. The two men met Lippner at the airport, and prior to departure all three were arrested by a DEA agent.

The government also introduced telephone toll records at trial showing that calls had been placed between Paulk's residence and the residence of Lippner and Williams. Finally, the prosecution introduced a prior conviction against Paulk for conspiracy to import marijuana.

Paulk moved for acquittal on the ground of insufficient evidence at the close of the prosecution's case-in-chief. The motion was renewed at the close of all the evidence and again after the jury's verdict, which found the defendants guilty of the one count conspiracy charge. On May 8, 1981, the court, by written order, granted Paulk's Motion for Judgment of Acquittal Notwithstanding the Verdict. (App. C, *infra*, 1c-4c).

On April 29, 1982, the Eleventh Circuit Court of Appeals reversed the trial court's order granting Paulk's Motion for Judgment of Aquittal Notwithstanding the Verdict. On June 25, 1982, Paulk's Petition for Rehearing and Suggestion for Rehearing En Banc was denied.

REASONS FOR GRANTING THE PETITION

This case presents an important due process question of exceptional, importance warranting review by this Court. This issue arises from the Court of Appeals holding that the trial court erred in granting Paulk an acquittal notwithstanding the verdict since the evidence was sufficient

for the jury to find guilt beyond a reasonable doubt. The conclusion of the court below is at odds with this Court's and several other court of appeals decisions. Moreover, the conclusion of the Eleventh Circuit is contrary to the established principles of the Fifth Amendment and due process of law. The conspiracy statutes which are very broad, indeed, require extra care and precaution upon reviewing the sufficiency of evidence and an individual's freedom.

WHETHER THERE WAS SUFFICIENT EVIDENCE IN THE RECORD WHICH CONNECTED PAULK AS A KNOWING PARTICIPANT TO THE ALLEGED CONSPIRACY, ESPECIALLY HERE, WHERE THE TRIAL COURT GRANTED DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT.

It is well established in the law of conspiracy that the government must prove by the evidence beyond a reasonable doubt not only that the conspiracy did, in fact exist, but also that the defendant knew it and, with that knowledge, agreed to take part in it and become a member of it. *United States v. Dyar*, 574 F.2d 1385 (5th Cir. 1978) *cert. denied*, 439 U.S. 982 (1978); *United States v. Malatesta*, 590 F.2d 1379 (5th Cir. 1979) (en banc) *cert. denied*, 440 U.S. 962 (1979).

Cases involving circumstantial evidence are no different. In *United States v. Barrera*, 547 F.2d 1250 (5th Cir. 1977), the Court stated:

> . . . in testing the sufficiency of the evidence in this circumstantial evidence case it was the duty of the trial judge, before sending the case to the jury, to determine whether a reasonably minded jury *must* necessarily entertain a reasonable doubt under the

> evidence. (at 1255) (Citations omitted; emphasis added).

In the case at bar, a reasonably minded jury must necessarily entertain a reasonable doubt under the evidence as to Paulk's knowing participation in the "quaalude deal". As the trial court stated in its order granting Paulk's Motion for Judgment of Acquittal Notwithstanding the Verdict:

> Here, the evidence that a conspiracy existed is apparent. Government informant Tedder testified that he agreed with co-defendant Lippner that they should pursue the "quaalude deal" in question. Co-defendant Williams was tape recorded as he negotiated with a government agent to consummate this same deal.
>
> There is insufficient evidence to establish, however, that co-defendant Paulk either knew about the "quaalude deal" or intended to participate in it. *There was never any evidence adduced at trial to indicate that anyone had ever discussed the plans to purchase quaalude tablets with Paulk, or that this transaction was ever discussed in his presence.* Though Paulk was often in the company of the conspirators, and had arguably spoken with them on the telephone, *there is nothing in the record which can connect him with the conspiracy as a knowing participant.* (App. C, 3c) (Emphasis added)

In evaluating the issue here, this Court must inquire whether the jury might reasonably conclude that the evidence, viewed in a light most favorable to the government, is inconsistent with every reasonable hypothesis of the accused's innocence. *United States v. Fredericks*, 586 F.2d 470, 474 (5th Cir. 1978).

With this test in mind, the trial court found that the evidence, in a light most favorable to the government,

showed nothing more than Paulk's presence in the general area where the alleged conspiracy took place and his association with the purported conspirators.

This Court has held that mere presence and association is insufficient without more, to sustain a conviction for conspiracy. *United States v. DiRe*, 332 U.S. 581, 593 (1942).

An analysis of federal case law finding the evidence insufficient to show participation in a conspiracy demonstrates that the trial court was correct and that the evidence in the present case was insufficient under federal standards to convict Paulk of conspiracy.

Other Circuit Courts have decided this issue contrary to the position taken by the Eleventh Circuit Panel opinion.

For example, the facts here are conceptually similar to those faced by the Sixth Circuit in the case of *United States v. Webb*, 359 F.2d 558 (6th Cir. 1966). In *Webb*, the Court held:

> The evidence puts defendant Stokely on the scene of events which positively or by fair inference could be deemed a part of a moonshine liquor distribution conspiracy. But this record is devoid of any testimony which links defendant Stokely to any integral element of such a plan, except by presence and association. . .
>
> Defendant Stokely's unexplained presence during such a series of suspicious events might well justify grave doubts about her role. But neither association with conspirators nor knowledge that something illegal is going on by themselves constitute proofs of participation in a conspiracy. *United States v. Falcone*, 311 U.S. 205 (1940); *United States v. Potash*,

> 118 F.2d 54 (2nd Cir.) (*cert. denied*, 313 U.S. 584 (1941)).

359 F.2d at 562.

Any "doubts" about Paulk's role, here, can only be based upon Paulk's association with the alleged conspirators and his presence in the general area where the purported conspiracy took place. However, as stated in the trial court's order:

> . . . it is impossible to conclude that all of the evidence adduced against defendant Paulk, viewed in a light most favorable to the government, is sufficient to support a guilty verdict. (App. C, 4c)

Another case, *United States v. Dyar*, 574 F.2d 1385 (5th Cir. 1978), involved a conspiracy to import marijuana. At trial, Fleming (an unindicted coconspirator and government witness) and two other individuals, met at a motel and discussed marijuana importation. Fleming agreed to pilot the aircraft on which the marijuana would be imported. At that moment, the defendant DeMatto, entered the motel room:

> DeMatto was introduced as the man with the rock group connections and as the street distributor of the grass, but made no comment in response to that description. Following the introduction and after some small talk, DeMatto asked Fleming if he was "going to help with this thing". Fleming responded affirmatively. DeMatto "appeared to be pleased" and said he would be back in touch with Fleming, but was never again in contact with him. (At 1386-7).

The Court held that the government failed to prove that when the defendant entered this room, he knew of the conspiracy which had been reached by the other participants. The Court also held that the government had certainly failed to prove that the defendant agreed to

participate in the conspiracy.

In the case at hand, a very similar situation exists. Here, the Eleventh Circuit points out that Paulk, while in his motel room, introduced Tedder to co-defendants Williams and Mills as "the persons that [Tedder] would be introducing to [Tedder's] people. (App. A, 4a) This vague comment can be compared to Fleming's testimony in the *Dyar* case. There, Fleming swore that DeMatto asked him if he was going to help them with "this thing". As the Court pointed out, there was no elaboration as to whether "this thing" was flying rock groups around the country or importing or distributing marijuana:

> Fleming neither quoted nor paraphrased any conversation about marijuana while DeMatto was in the room. To the contrary, he concluded his testimony by saying that DeMatto never told him that he would help with the marijuana undertaking. (At 1389)

Similarly, in the instant case, there was no elaboration as to who "your people" were (i.e. was it Lippner, the co-defendant with whom Tedder was sharing a room or Tedder's family in Florida?) or for what purpose the introduction to "your people" was being made. While in the *Dyar* case, no discussions of marijuana occurred in *DeMatto's* presence, in the instant case, no discussions of quaaludes occurred in Paulk's presence. Certainly, the government, here, did not prove by evidence beyond a reasonable doubt that Paulk knew that the conspiracy did in fact exist and that Paulk ever agreed to take part in it.

The Eleventh Circuit Court incorrectly found that the evidence here was at least as great as that presented in *United States v. Alvarez*, 625 F.2d 1196 (5th Cir. 1980),

cert. denied, ____ U.S. ____, 101 S.Ct. 2017 (en banc).

Thus, a review of *Alvarez* is essential. In *Alvarez, supra*, co-defendant Cifarrelli told Agent Martinez that Alvarez would be at the off-loading site when the plane returned. Agent Martinez discussed the plan with Cruz, who confirmed that he owned the farm where the marijuana would be obtained and that security was assured. Agent Martinez then asked Alvarez if he was going to be there at the unloading site. Alvarez smiled, nodded affirmatively and asked Agent Martinez if he was going on the plane.

Both Cifarrelli and Alvarez assured Agent Martinez that Alvarez would be at the off-loading site. Thus, there was direct evidence from Alvarez himself, that he would be there.

The Fifth Circuit Court noted that the evidence would have been insufficient to support the conviction without the proof that Cifarrelli and Alvarez assured Agent Martinez that Alvarez would be on hand at the place and time of the airplane's return to Florida.

Since Cifarrelli confirmed that he owned the marijuana farm in Alvarez' presence and since Alvarez assured Agent Martinez that he would be at the off-loading site, a reasonable jury could conclude that Alvarez had agreed to participate in the scheme to accomplish the importation. That was the only reason Alvarez could have had for being on hand at a remote and unlikely area for the unloading of cargo. As the court stated:

> The duty was such that anyone agreeing to perform it would, without any doubt, understand that the operation was illegal.

The case at bar is different. Paulk allegedly introduced Tedder to Williams and said "these are the people that

[Tedder] would be introducing to [Tedder's] people". Firstly, this testimony was given by Tedder, an alleged coconspirator, whose statement is suspect since he admittedly was seeking favorable treatment from the judge. The testimony in *Alvarez*, came from an undercover agent, and not a coconspirator. Also, here, the introduction was a lawful act while in *Alvarez* the agreement to off-load was in and of itself an illegal act. Thus, it is hard to imagine how the evidence here can be stronger than the evidence in *Alvarez*.

Furthermore, in *Alvarez*, the drugs (i.e. marijuana) and illegal activity were actually discussed in Alvarez' presence while here, no such conversations took place. The Eleventh Circuit Court overlooked the following testimony of Tedder:

> Q: And in your statement given to Mr. Sprague, although you mention the trip, you don't mention anything about the Quaalude deal in the statement, did you? Remember?
>
> A: I recall—I seem to recall that I told in the debriefing that there was no discussion in the airplane whatsoever regarding the Quaalude deal.
>
> Q: All right. So your testimony then is that on the morning of November 19th when you go into Paulk's room to borrow shaving equipment, that's the first time you really talked to Paulk about the Quaalude deal, according to your testimony?
>
> A: Well, we did not actually discuss anything about the Quaalude deal other than the very informal introduction.
>
> Q: Okay. So that even on the morning of the 19th when you walked into the room, there was really no discussion about a Quaalude deal with Paulk, was there?

A: Not with Mr. Paulk. (pp. 52-53)

* * *

Q: And there's no discussion of the Quaalude deal, is there?

A: That is correct. (p. 54)

Thus, there was testimony by coconspirator Tedder, himself, that he and Paulk *never* discussed the purchase or sale of quaaludes to the government agents or to anyone, and that Paulk's introduction of Williams to Tedder was the most informal of introductions with no quaaludes or drugs ever being mentioned.

This Court should note, that Tedder's role was that of a go-between. He introduced Johannesen to Williams. Johannesen and Williams then consummated the deal. Paulk allegedly introduced Williams to Tedder, and while a finder of fact may feel the introduction was suspicious, there is not one iota of evidence in the record as to the purpose of the introduction (in fact it was purely happenstance that Tedder walked into Paulk's room that morning to borrow shaving gear). Paulk was never involved in an illegal act. Paulk was never present during any conversations concerning marijuana, quaaludes or any other drug. Paulk was not in some remote area where there would be no other reason for being present. Again, what the Eleventh Circuit Court has overlooked is that Tedder, the government's key witness and middleman of the transaction, testified that he never discussed the quaalude deal with Paulk.

Thus, on the facts before this Court, it must conclude that a reasonable juror could not have been able to reasonably exclude the hypotheses of the accused's innocence. Although Paulk was present with the "conspirators" at a

hotel in Savannah, this Court has settled that mere presence is insufficient, without more, to sustain a conviction for conspiracy. *United States v. DiRe, supra.* There was no evidence that Paulk was aware of a "quaalude deal" and Tedder specifically testified that he had never discussed quaaludes with Paulk. The joint presence of Paulk and the conspirators at the airport and the preexisting relationship between the parties is insufficient to prove beyond a reasonable doubt that Paulk was a member of the conspiracy. Thus, the casual introduction of Williams and Mills to Tedder by Paulk, when Tedder entered Paulk's room for the specified purpose of using his shaving equipment, did not provide a legitimate basis for inferring his participation in a conspiracy to possess with intent to distribute methaqualone tablets (quaaludes). There was not one iota of evidence that Paulk knew of a "quaalude deal", let alone that he conspired to possess quaaludes with the intent to distribute them.

Certainly, if Paulk's introduction of Williams and Mills to Tedder was that significant, the government would not have dismissed the charges against Mills. Surely Mills' presence in the very room where the tape recordings were made and where the "deal" was to be finalized is more compelling proof of membership in the conspiracy than is Paulk's present in the room adjoining Lippner's and Tedder's. Moreover, Mills' presence in the midst of the showing of more than $100,000.00 in cash must be more persuasive of membership in a conspiracy than Paulk's "casual" introduction of Williams and Mills to Tedder. The mere presence of Mills and the mere presence of Paulk should result in the same justice for both.

CONCLUSION

The conspiracy statutes are very broad indeed. It is for this very reason, that extra care and precautions should be taken in affirming a conspiracy conviction. This case should be even more carefully scrutinized, and the petition for certiorari granted, for the trial judge who heard the evidence, who observed the witnesses, and who had the opportunity to form an opinion as to their credibility ruled that there was insufficient proof to convict Paulk. The very fact that the trial judge found insufficient evidence shows that reasonable minds could differ on the issue of the defendant's guilt. Certainly, with this in mind, it becomes clear that the evidence, even when viewed in a light most favorable to the government, is not inconsistent with every reasonable hypothesis of the accused's innocence. Therefore, it is respectfully submitted that for the reasons set forth above, that this Honorable Court should grant certiorari and reverse the Eleventh Circuit Court of Appeals' opinion and uphold the trial court's order granting Paulk's Motion for Judgment of Acquittal Notwithstanding the Verdict.

Respectfully submitted,

KADISH, DAVIS & BROFMAN, P.C.

By:_____
MARK J. KADISH

By:_____
RHONDA A. BROFMAN

Attorneys for Petitioner

CERTIFICATE OF SERVICE

This is to certify that I have this date served opposing counsel, Mr. Joseph Newman and Ms. Melissa S. Mundell, Assistant United States Attorneys, Southern District of Georgia, Post Office Box 8999, Savannah, Georgia 31412, with a copy of the within and foregoing Petition for Certiorari, by depositing same in the United States Mail in a properly addressed envelope with adequate postage affixed thereon to insure delivery.

This the ____ day of August, 1982.

RHONDA A. BROFMAN

APPENDICES

APPENDIX A

IN THE UNITEDSTATESCOURT OE APPEAL S

FOR THE ELEVENTH CIRCUIT

No. 81-7478

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JAMES E. PAULK,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

(April 29, 1982)

Before TUTTLE, KRAVITCH, and JOHNSON, Circuit Judges.

PER CURIAM:

This appeal arises from appellee James Paulk's trial with co-defendants Robert L. Lippner and James Buddy Williams on charges of conspiracy to possess with intent to distribute a controlled substance, methaqualone, in violation of 21 U.S.C. §§ 841(a)(1), 846. The facts pertaining to this appeal are recounted in this court's opinion in *United States v. Lippner*, No. 81-7417, ____F.2d ____ (11th Cir. 1982).

The sole issue before us is whether the trial court erred in granting Paulk an acquittal notwithstanding the verdict. The government asserts that the evidence here was at least as great as, if not greater, than that presented in *United States v. Alvarez*, 625 F.2d 1196 (5th Cir. 1980), *cert. denied*, ____ U.S. ____, 101 S.Ct. 2017 (en banc) which the en banc former Fifth Circuit found sufficient to sustain a drug conspiracy conviction under § 846. We agree and reverse.

"In passing on motions for acquittal, the reviewing court must view the evidence in the light most favorable to the government, and the jury verdict is entitled to the benefit of all reasonable inferences that might be drawn therefrom." *United States v. Gorel*, 622 F.2d 100, 106 (5th Cir. 1979). In *Alvarez*, "the only question [w]as whether the jury could reasonably conclude that the evidence, viewed in the light most favorable to the government, left no reasonable doubt of the appellant's guilt." *Alvarez*, supra, 625 F.2d at 1197. As summarized by the majority opinion, the evidence in *Alvarez* showed that:

> John Cifarrelli and Edward Peterson during April and May of 1978 discussed with undercover DEA agents Martinez and Caton their scheme for importation of marijuana from a farm in Colombia to the Miami area. The transportation was to be by aircraft to be loaded at a farm in Colombia owned by a coconspirator, refueled at a small island in the Caribbean and off-loaded at a rural site west of Miami. The undercover agents were to supply the aircraft for an agreed price. Maps, radio frequencies and code names were produced.
>
> The owner of the Colombian farm, Genaro Cruz, arrived in Miami from Colombia on May 16. He spent the night with his friend, our appellant, Manuel Alvarez. The following morning Alvarez drove a

pickup truck, in which Cruz was riding and which was loaded with household appliances, to the Opa Locka airport. There they met Cifarrelli, who directed them to the plane which had been supplied by the undercover agents. The agents had not previously met Cruz or Alvarez, nor had their names been revealed, although the agents had been told that the owner of the Colombian farm would handle things on that end and that arrangements would be made for unloading the plane when it returned. Cifarrelli told Agent Martinez that the other two men in the pickup truck were the farmer from Colombia and the one who would be at the off-loading site on return. Martinez discussed the plan with Cruz, who confirmed that he owned the farm where the marijuana would be obtained and that security was assured. Martinez then asked Alvarez if he was going to be there at the unloading site. Alvarez smiled, nodded affirmatively, and asked Martinez if he was going on the plane. After Alvarez had loaded appliances on the plane and was about to leave in the truck, the identity of the agents was revealed and the conspirators were placed under arrest.

Id. The evidence which convicted *Alvarez*, therefore, consisted essentially of his association with the other conspirators, and the indication, by his affirmative reply to the question whether he was going to be present for the unloading, that he knew of the illegal activity and voluntarily participated in it.

After reviewing the record, we conclude that the evidence connecting Paulk to the methaqualone conspiracy is stronger than the evidence the former Fifth Circuit found sufficient to convict Alvarez. In addition to the evidence of Paulk's presence and association with Lippner and Tedder, other evidence provided a basis for an inference that Paulk was connected with the drug con-

spiracy. Telephone records introduced at trial, for example, showed that from October 21 to November 20 of 1980, eleven calls were placed from Paulk's telephone to Lippner's and three from Lippner's phone to Paulk's. More importantly, the records reveal that on November 16, the day that Tedder and Johannesen finalized the methaqualone sale, calls occurred between Lippner and Paulk's phones and between Paulk's phone and a phone which the jury could have found was Williams' home phone.

The most damaging evidence against Paulk, however, was Paulk's statement to Tedder on the morning of the drug transaction introducing Williams and Mills to Tedder as "the persons that [Tedder] would be introducing to [Tedder's] people." Tedder testified that he understood this to be a reference to agent Johannesen in his undercover role. The statement, therefore, is far more persuasive evidence of Paulk's knowledge of the drug conspiracy and active role as "broker" than was Alvarez's nod and smile. Consequently, on the controlling authority of *Alvarez*, we find the evidence was sufficient for the jury to find guilt beyond a reasonable doubt and we reverse the trial court's grant of acquittal.

REVERSED.

APPENDIX B

[U.S. Court of Appeals, Eleventh Circuit, Filed June 25, 1982, Norman E. Zoller, Clerk]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7478

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

JAMES E. PAULK,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 29, 1982, 11 Cir., 198__, ____ F.2d ____).
( )

Before TUTTLE, KRAVITCH and JOHNSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in Active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED

ENTERED FOR THE COURT:

/s/ PHYLLIS KRAVITCH
United States Circuit Judge

APPENDIX C

[Filed May 8, 1981]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* V. JAMES BUDDY WILLIAMS, ROBERT L. LIPPNER, JR., and JAMES E. PAULK, *Defendants.*	CRIMINAL ACTION NO. CR. 480-62

ORDER

All three defendants in this case were indicted, tried and convicted of conspiracy to possess with intent to distribute methaqualone tablets, a schedule II controlled substance, in violation of 21 U.S.C.A. § 846 (1972). This case is presently before the Court on the motion of defendant Paulk for a judgment of acquittal notwithstanding the verdict of the jury.

The evidence adduced at trial against Paulk established that he travelled to Savannah, Georgia, in the company of co-defendant Lippner and former co-defendant (turned government informant) Tedder. When the trio reached Savannah, they stayed at the Holiday Inn, Paulk in one room and Lippner and Tedder in an adjoining room. The next morning, Tedder (the government informant) entered Paulk's room to borrow some shaving gear, where he observed Paulk, along with co-defendant Williams and co-defendant Mills (whose case was first severed by the court, and then voluntarily dismissed by the prosecution after the trial and conviction of the other three co-defendants). Paulk introduced Tedder to Williams and Mills

and then told Tedder, "This is the guy you are going to be introducing to your people."

Later, this party split up into two groups. Williams and Mills went to another area motel where they were arrested after negotiations for the sale of quaalude tablets had taken place with an undercover agent of the Drug Enforcement Administration. Paulk, Lippner and Tedder proceeded to the Savannah Municipal Airport where they were arrested while trying to depart Savannah in a twin Cessna aircraft.

Adduced at trial was a tape recorded statement by co-defendant Williams that he knew Paulk "pretty well" and that he was "okay . . . in my book." The government also introduced telephone toll records at trial showing that calls had been placed between Paulk's residence and the residence of co-defendants Lippner and Williams. Finally, the prosecution introduced a prior conviction against Paulk for conspiracy to import marijuana.

It is elementary that the government's burden in a conspiracy case is to prove beyond a reasonable doubt that a conspiracy existed, that the defendant knew about it, and that with that knowledge, he agreed to take part in the conspiracy. *United States v. Dyar*, 574 F.2d 1385 (5th Cir.) *cert. denied*, 439 U.S. 982 (1978); *United States v. Malatesta*, 590 F.2d 1379 (5th Cir.) (*en banc*) *cert. denied*, 440 U.S. 962 (1979).

Here, the evidence that a conspiracy existed is apparent. Government informant Tedder testified that he agreed with co-defendant Lippner that they should pursue the "quaalude deal" in question. Co-defendant Williams was tape recorded as he negotiated with a government agent to consumate this same deal.

There is insufficient evidence to establish, however, that co-defendant Paulk either knew about the "quaalude deal", or intended to participate in it. There was never any evidence adduced at trial to indicate that anyone had ever discussed the plans to purchase quaalude tablets with Paulk, or that this transaction was even discussed in his presence. Though Paulk was often in the company of the conspirators, and had arguably spoken with them on the telephone, there is nothing in the record which can connect him with the conspiracy as a knowing participant.

These facts are conceptually similar to those faced by the Sixth Circuit in the case of *United States v. Webb*, 359 F.2d 558 (6th Cir. 1966). In *Webb*, the Court held:

> "The evidence puts defendant Stokely on the scene of events which positively or by fair inference could be deemed a part of a moonshine liquor distribution conspiracy. But this record is devoid of any testimony which links defendant Stokely to any integral element of such a plan, except by presence and association . . . .
>
> Defendant Stokely's unexplained presence during such a series of suspicious events might well justify grave doubts about her role. But neither association with conspirators nor knowledge that something illegal is going on by themselves constitute proofs of participation in a conspiracy. *United States v. Falcone*, 311 U.S. 205 (1940); *United States v. Potash*, 118 F.2d 54 (2nd Cir.) *cert. denied*, 313 U.S. 584 (1941)."

359 F.2d at 562.

Here too, the Court has grave doubts about the role defendant Paulk played in this conspiracy. These doubts are based solely upon defendant's association with the conspirators and his presence in the general area where the conspiracy took place, however. It is well established

that these types of evidence, while they may provide a common sense basis for determining that someone is probably guilty of conspiracy, are insufficient to establish guilt beyond a reasonable doubt. The cases illustrating this truism are legion. *See, e.g. United States v. Di Re*, 332 U.S. 581 (1948); *United States v. Chandler*, 586 F.2d 593 (5th Cir. 1978) *cert. denied*, 440 U.S. 927 (1979); *United States v. Dyar*, 574 F.2d 1385 (5th Cir. 1978); *United States v. Caro*, 569 F.2d 411 (5th Cir. 1978); *United States v. Duckett*, 550 F.2d 1027 (5th Cir. 1977). It is therefore impossible to conclude that all of the evidence adduced against defendant Paulk, viewed in a light most favorable to the government, is sufficient to support a guilty verdict.

It follows, therefore, that defendant Paulk's motion for a judgment of acquittal notwithstanding the verdict of the jury should be, and is hereby GRANTED.

SO ORDERED, this 8th day of May, 1981.

/s/ ANTHONY A. ALAIMO
Chief Judge, United States District Court, Southern District of Georgia